STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Owens, P.J., Markey and Murray, J.J.

PRESERVE THE DUNES, INC.,
Plaintiff-Appellee
v
MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant.

TECHNISAND, INC.
Defendant-Appellant
_____/

Supreme Court No. 122611

Court of Appeals No. 231728

Berrien CC No. 98-003789-CE

PRESERVE THE DUNES, INC.,
Plaintiff-Appellee
v
MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant-Appellant

TECHNISAND, INC.
Defendant.
_____/

Supreme Court No. 122612

Court of Appeals No. 231728

Berrien CC No. 98-003789-CE

DEFENDANT-APPELLANT MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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Dated: August 1, 2003

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ARGUMENT

I. The Department's request that Part 637 of NREPA, and § 63702 in particular, be enforced as written is not a request for unbridled authorization to destroy legislatively defined natural resources.

Appellee, Preserve the Dunes (PTD), argues that defendant, Michigan Department of Environmental Quality (DEQ or Department), seeks to have provisions of Part 637, Sand Dune Mining, MCL 324.63701, *et seq*, of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*, declared judicially unenforceable, so that it will not have to follow § 63702 of NREPA in the future. (Brief of Appellee, p 6). PTD warns that there will be dire consequences if the courts do not directly enforce every permitting requirement of Part 637 as the standard for a claim under Part 17, Michigan Environmental Protection Act (MEPA), MCL 324.1701, *et seq* of NREPA, and in this case the "grandfathering" provisions contained in § 63702.

The Department seeks to have the Court enforce both Part 17 and Part 637. But, they are different. Part 637 specifically distinguishes the MEPA standard from § 63702. Each must be enforced as provided by law.

Part 637 prohibits sand dune mining in certain Great Lakes sand dune areas without a permit from the DEQ. MCL 324.63704. By their terms, § 63702 and § 63709 of Part 637 describe when the Department must deny a permit. MCL 324.63702; 324.63709. Like the Court of Appeals, (Appendix, p 245a), PTD argues that both sections prohibit mining (Brief, p. 8-10) although by their terms, they only restrict departmental discretion. By limiting departmental activity, the Legislature provided for court scrutiny by way of administrative appeal and subsequent judicial review. Part 637 does not directly protect the environment by setting standards for activity that constitutes impairment or destruction of natural resources; it does so

by putting limits on the administrative permitting procedures. Part 17, on the other hand, protects the environment directly, not by limiting administrative procedure.

Part 17 protects natural resources from pollution, impairment or destruction by way of the cause of the action authorized at MCL 324.1701 and described at MCL 324.1703. Where the Department's permitting activity is the last step before moving from paperwork to the outdoors, that activity may be reviewed to determine whether it complies with MEPA. *Wortelboer v Benzie County*, 212 Mich App 208; 220-221, 537 NW2d 603 (1995).

After a six day trial, the Berrien County Circuit Court determined that the defendants had "effectively and conclusively rebutted" plaintiff's *prima facie* case that the permit amendment issued by the department to authorize mining into a critical dune area would impair or destroy natural resources of the state. (Appendix, p 218a). PTD asks the Court to reject the trial court's decision, not because it got the facts wrong, but because it wants the Court agree with the Court of Appeals and apply the permitting standards of Part 637 and of § 63702 in particular to define what constitutes impairment or destruction of resources rather than simply to define what the Department can or cannot do. (Appellee Brief, p 16).

The bridge used by PTD to get from a MEPA action where the question is whether the issuance of a permit will pollute, impair or destroy a natural resource (MCL 324.1701), to an action where the question is whether the Department complied with Part 637 permitting requirements is this Court's decision in *Nemeth v Abonmarche Development, Inc,* 457 Mich 16, 576 NW2d 641 (1998). *Nemeth* considered a portion of NREPA (Part 91, Soil Erosion and Sedimentation Control, MCL 324.9101 *et seq.*) in applying § 1701(2) of MEPA, which requires a court in a MEPA action to consider any applicable pollution control standards. However, unlike Part 637 of the Sand Dune Mining Act in the present case, Part 91 actually addresses pollution control and sets pollution control standards. *Nemeth*, 457 Mich at 29. PTD argues that

every provision of Part 637 must be considered the "MEPA" standard in every case, "because it relates to protecting the environment and natural resources from pollution, impairment or destruction." (Appellee Brief, p. 11-14). Other MEPA cases that have reviewed statutory standards have also addressed pollution control standards. *City of Jackson v Thompson-McCully Co, LLC,* 239 Mich App 482; 608 NW2d 531 (2000); *Her Majesty the Queen v Detroit,* 874 F2d 332 (CA 6, 1989). However, not every MEPA case turns on existing statutory or departmental pollution standards. See, e.g., *West Michigan Environmental Action Council v Natural Resources Comm*, 405 Mich 741; 275 NW2d 538 (1979). And not every statutory provision relating to natural resources sets a MEPA standard. Some such provisions -- like Part 637 in the present case -- protect by way of restricting permitting activity, perhaps for reasons other than complying with the MEPA standard.

Except for § 1704, which allows a court reviewing an action for compliance with § 1701 to get input from an agency, the Legislature does not define the interaction between MEPA and other Parts NREPA. It might, as it did in the provision reviewed in *Genesco, Inc v Michigan Department of Environmental Quality,* 250 Mich App 45; 645 NW2d 319 (2002), define a peculiar interaction in a particular area to effect environmental protection. It also defines their interaction in Part 637, requiring the department to apply the MEPA standard in § 63709 and imposing additional limits upon the Department in § 63702. The environmental protections effected by the permit procedure of Part 637 are assigned to the Department, subject to administrative review to determine compliance with that permitting procedure and to review under MEPA to ensure protection of the environment.

As Amicus West Michigan Environmental Action Council points out, § 63702 does not state a pollution control standard that is to be reviewed according to MCL 324.1701(2). (Brief, p. 8). Section 63702 prevents the department from issuing or amending a permit to allow mining in

a critical dune area unless one of the two exceptions apply. One relates to when the permit was first issued, § 63702(a), and the other, § 63701(b), to when the property onto which mining will extend was first purchased by the permittee, without regard for when the permit was issued. As the text of § 63702 indicates, § 63702 does not limit DEQ action to create a "higher MEPA standard." Section 63702 directs the Department not to grant a permit, "notwithstanding" the other provisions of Part 637, and § 63709 requires the Department to review the required environmental impact statement according to the language of MEPA itself and deny the permit if the activity "is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in those resources, a provided by Part 17."

If the standard expressed in § 63709 prohibits mining as a matter of Part 17, MEPA, the § 63702 prohibition upon mining in a critical dune area is redundant. Or, if § 63702 gives "additional" authority, it functions to authorize a MEPA violation, whenever either of the two exceptions applies. Section 63702 actually operates where a proposed mining operation satisfies MEPA, and functions as an additional restriction upon permitting authority.

PTD ignores the "notwithstanding" phrase that introduces § 63702. PTD inverts the legislatively declared order between the two sections and applies § 63709 to prohibit what is otherwise authorized by one of the exceptions of § 63702. Contrary to PTD's interpretation, § 63709 prohibits any mining that violates MEPA. Section 63702 prohibits any mining in critical dune areas unless the specified exceptions are met, notwithstanding that the mining is not prohibited by § 63709 and MEPA.

The unstated premise of PTD's argument and the implicit assumption behind the position taken by the Court of Appeals is that when the Legislature regulates concerning environmental matters, everything it does refines and adds to MEPA. Many parts of NREPA regulate departmental and public behavior without regard for whether the governed activity rises to the

level of pollution, impairment or destruction of the environment prohibited by MEPA. By Part 303, MCL 324.30301, *et seq*., the Department can permit activities in wetlands only if the Department finds them to be in the public interest by way of a multifaceted investigation, one element of which is whether the decision protects natural resources from pollution, impairment and destruction. MCL 324.30311(2). Section 30311 requires the Department to consider the entire list of described factors, not just the limited factors set out by MEPA.

Similarly, a Department permit decision under Part 301, Inland Lakes and Streams, MCL 324.30101 *et seq*, turns upon whether a project is consistent with the public trust and riparian rights. MCL 324.30106. When it makes a decision whether to issue a permit, the department must also consider uses of the water by local government, agriculture, commerce and industry. It may not issue a permit if the proposed activity will unlawfully destroy or impair natural resources, the only limitation on its authority that invokes MEPA criteria. *Id.*

The Legislature can restrict the Department from issuing permits, even when violation of the restriction would not pollute, impair or destroy natural resources. Limitations on permitting authority do not necessarily imply an "irrebuttable presumption" of adverse environmental impact, and particularly do not imply that mining in a "critical dune" is likely to pollute, impair or destroy a natural resource. (Amicus, Lake Michigan Federation, Brief p 12). The natural resources protected by Part 637 include the "critical dune areas," identified by MCL 324.35302, and the other "environmental elements," MCL 324.63701(g), that must be included in the Environmental Impact Statement required by MCL 324.63705. According to MCL 324.63709, the department must review impacts on such resources under MEPA criteria. If § 63702 also provides an environmental standard, it is necessary to believe that distinct environmental consequences arise, depending upon when the permit to destroy the resource first issued or when the property where the resource is located was last sold.

The Legislature assigned specific protections to "critical dune areas", as such, declaring the critical dune areas of the state *as a whole* to be a unique and valuable resource.

> (a) The critical dune areas of this state are a unique, irreplaceable, and fragile resource that provide significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural, and ecological benefits to the people of this state and to people from other states and countries who visit this resource. [MCL 324.35302(a)].

The statute does not identify individual critical dunes or individual elements of critical dune areas, as the subject of Part 637.

Accordingly, there is no indication that the Legislature intended to create an irrebuttable presumption that any mining in any critical dune area constitutes pollution, impairment or destruction of a natural resource, and to do so would be inconsistent with MEPA itself. Such a presumption would undermine the very action created by Part 17, which specifically authorizes rebuttal of a *prima facie* showing of MEPA violation. (MCL 324.1703(1)). The concept of an "irrebuttable presumption" is rightly characterized as a "conflict of terms." *In re Findlay Estate*, 430 Mich 590, 599; 424 NW2d 272 (1988). Any irrebuttable presumption of adverse impact on the environment may well conflict with the facts in a particular case, and, based upon the record, would do so here. Ordinarily presumptions assign the burdens in a lawsuit, they do not prevent introduction of conflicting evidence. *Widmeyer v Leonard*, 422 Mich 280, 291; 373 NW2d 538 (1985).

A particular dune may deserve protection and receive it under Part 637 and Part 17. But the importance of cross-examination is clear. PTD made claims concerning this site and mining in general of the sort contained in the position paper that Amicus Curiae Lake Michigan Federation attached to its brief, which was admittedly part of efforts to provoke legislative change of existing law (Lake Michigan Federation, Brief, p iii-iv). When such claims were subjected to cross examination, they were found wanting. (Appendix, pp 222a-224a). The

proofs showed that the environmental qualities of this dune will persist after mining is complete. (Appendix, p 225a). Whatever the virtues of Michigan sand dunes generally and of the critical dune areas generally, the record here rebutted PTD's prima *facie* case that the mining proposed on the site in question will result in degradation, impairment or destruction of a natural resource. (Appendix, p 237a). .

Attorney General v Harkins, ___Mich App___; ___NW2d___; 2003 Mich App LEXIS 1682 (No 227720, July 17, 2003, copy attached), indicates that enforcement actions to correct permit violations are subject to a six year statute of limitations. (Slip Opinion, p 4, n 4). Similarly, judicial review of the Department's permitting action here was not available because Appellee did not challenge the departmental action in a timely fashion and that remedy was no longer available. (Appendix, p 47a). MCL 600.631 provides for court review of agency actions. And, NREPA specifically authorizes a person with legal standing to challenge any initial agency permitting decision, a challenge that may be by contested case hearing. MCL 324.1101(1). Access to the courts for review of an agency licensing decision generally requires exhaustion of such administrative remedies. MCL 24.301.

Such ordinary agency appeal procedures impose burdens upon those who would challenge agency action. Appellee conceded that it had at most 90 days to appeal the administrative action and had failed to meet that deadline. (Appendix, p 47a). Amicus, Lake Michigan Federation, appears to take the unavailability of judicial review in this case as an indication that Michigan law does not provide any judicial review of administrative actions. (Brief, pp 6-10). PTD's failure to make timely challenge of the DEQ's manner of applying the critical dune area mining prohibition does not imply that that the "prohibition is not judicially enforceable at all." Nor does it either indict the appellate procedure itself or authorize the DEQ ever after to issue a permit so long as the mining is not likely pollute, impair of destroy natural

resources of the state. (Appellee's Brief, p 6). PTD appears to overlook that the law directs how the Department must act and its actions are not exempt from judicial review.

The Legislature was surely aware of the notice provisions and the time periods associated with administrative appeal and the possibility that error would go unchallenged. Yet, it opted for a permit system, with limitations upon the Department. Even when such a system fails, the environment is always protected, because every action is ultimately subject to review according to MEPA.

If parties can get to the courts and have them directly enforce all permitting criteria through MEPA, without use of available administrative remedies to obtain review of matters not relating to pollution, impairment and destruction of the natural resources, the time and exhaustion provisions of MCL 24.301 and of the administrative schema itself become superfluous. Even § 1704 of MEPA contemplates that the courts will review the administrative proceedings to determine the potential for pollution or impairment of resources, not whether the administrative actions comply with the licensing statute. The court must undertake its own de novo review on issues of pollution, impairment or destruction of the natural resources. *West Michigan Environmental Action Council, Inc v Natural Resources Comm'm*, 405 Mich 741, 753-754; 275 NW2d 538 (1979).

The TechniSand site in question is the last known location in Michigan where the Department can authorize mining into a critical dune area under the exceptions of § 63702. (Appendix, p 217a). It is expected that the exceptions of § 63702 will not again come into play. After the present case is decided, the prohibition on new mining permits and on permit amendments that allow mining in critical dunes areas is expected to become absolute as a matter of fact.

If TechniSand's permit were transferred back to Manley Bros, the owner of the land and the permit in 1989, it would likely qualify for an amendment under both exceptions in § 63702(b). Contrary to the representations of PTD (Appellee's Brief, pp 11-12; 18), denial of the permit to TechniSand does not necessarily mean that no one is entitled to a mining permit for the location.

CONCLUSION AND RELIEF REQUESTED

The trial court in this matter thoroughly reviewed the evidence and determined, in a decision of the sort solicited by *Ray v Mason County Drain Comm'r*, 393 Mich 294, 309; 224 NW2d 883 (1975), that the Defendants successfully rebutted PTD's *prima facie* case of environmental impairment or destruction. The Court of Appeals inappropriately extended *Nemeth* by requiring the courts to become the decision maker in any challenged environmental permit action, without regard for time limits for administrative appeal, and by finding a violation of MEPA in the present case as a matter of law.

WHEREFORE, Defendant-Appellant Michigan Department of Environmental Quality respectfully requests this Court to reverse the Court of Appeals and reinstate the determination of the trial court.

Respectfully submitted,

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STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL and DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiffs-Appellants,

v

DONALD L. HARKINS,

Defendant-Appellee.

FOR PUBLICATION
July 17, 2003
9:00 a.m.

No. 227720
Oakland Circuit Court
LC No. 96-520092-CE

ATTORNEY GENERAL and DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiffs-Appellees,

v

DONALD L. HARKINS,

Defendant-Appellant.

No. 232934
Oakland Circuit Court
LC No. 96-520092-CE

Before: Zahra, P.J., and Murray and Fort Hood, JJ.

ZAHRA, P.J.

In Docket No. 227720, plaintiffs, the Michigan Attorney General and the Michigan Department of Environmental Quality (MDEQ) (collectively referred to in the singular as plaintiff), appeal as of right from an order granting summary disposition to defendant, Donald J. Harkins, which dismissed plaintiff's equitable action to restore wetlands that were altered in violation of a permit issued under Part 303 (Wetland Protection) of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.30301 *et seq.* In Docket No. 232934, defendant appeals as of right from the trial court's order denying his request for attorney fees and costs for defending against plaintiff's allegedly frivolous action. These cases were consolidated for purposes of appeal. We conclude plaintiff's action is barred by the six-year statute of

limitations found at MCL 600.5813.[1] We further conclude that the trial court did not clearly err when it found that plaintiff's action was not frivolous. We affirm.

I. Facts and Procedure

In 1987, defendant applied for a permit to fill in certain portions of his lakefront lot, which measured approximately one-tenth of an acre, for the creation of a beachfront. Plaintiff denied defendant's original permit application and defendant appealed that decision. While his appeal was pending, defendant accepted plaintiff's offer for a more limited permit, which was issued on March 15, 1988 (the modified permit). Defendant asserts that he completed his work on the property in 1988. On May 9, 1990, an administrative law judge affirmed plaintiff's denial of defendant's original permit application. That decision was affirmed by this Court in *Harkins v Dep't of Natural Resources*, 206 Mich App 317; 520 NW2d 653 (1994), which noted that a modified permit had been issued and concluded that no compensable "taking" had occurred. The Supreme Court denied leave to appeal.

On August 28, 1990, plaintiff investigated a report that defendant had developed his property in violation of the modified permit. Defendant met with John Jurcich of the Department of Natural Resources, who concluded in his report that the work appeared to be within the guidelines of the modified permit. Notwithstanding the conclusion reflected in Jurcich's report, on August 8, 1991, plaintiff issued a cease and desist order against defendant, alleging defendant's work on the property did not conform with what was authorized by the modified permit. The order prompted a criminal prosecution against defendant under the provisions of the former Wetland Protection Act, MCL 28.714, and the Inland Lakes and Streams Act, MCL 28.1951 *et seq*. On April 4, 1992, a district court judge dismissed the criminal action. Plaintiff did not appeal this dismissal.

On March 28, 1996, plaintiff filed this action seeking an injunction to require defendant to restore the wetlands and lake bottom and alleging that defendant had filled or dredged the wetlands in violation of the modified permit. Plaintiff also requested civil fines. Defendant eventually moved for summary disposition.[2] On April 12, 2000, the trial court issued an opinion and order granting defendant summary disposition of plaintiff's action under MCR 2.116(C)(10) (no genuine issue of material fact) and MCR 2.116(C)(7) (statute of limitations), and dismissing plaintiff's complaint. Defendant subsequently filed a motion for attorney fees and costs,

[1] Defendant also raises various issues regarding the constitutionality of the NREPA, which were never addressed by the trial court. We decline to consider defendant's constitutional claims "because this Court's review is limited to the record developed by the trial court." *Harkins v Dep't of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994). In any event, we need not resolve the constitutional claims because we find merit to defendant's statute of limitations argument.

[2] The trial court previously granted defendant summary disposition on January 15, 1997, on the ground that plaintiff filed an untimely brief in opposition to defendant's motion for summary disposition. This Court reversed the dismissal as "too harsh a remedy" and reinstated plaintiff's action in *Attorney General v Harkins*, unpublished opinion per curiam of the Court of Appeals, issued July 7, 1998 (Docket No. 202323).

claiming that plaintiff's action was vexatious, lacked a factual basis, and was filed with intent to harass. Following a hearing on October 26, 2000, the trial court denied defendant's motion.

II. Analysis

A. Docket No. 227720: Statute of Limitations

The trial court found that the six-year period of limitations set forth in MCL 600.5813 barred plaintiff's injunctive action to enforce the permit and restore the wetlands in question. Specifically, the trial court observed that defendant's alteration to the wetlands were completed in 1988. This action was commenced eight years after the wetlands were altered. The trial court concluded that plaintiff's equitable action was therefore barred by the six-year statute of limitations. MCL 600.5813.

The applicability of a statute of limitations is a question of law that we review de novo. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997). Statutes of limitation are procedural devices intended to promote judicial economy and protect the rights of defendants through the prevention of litigation of stale claims. *Stephens v Dixon,* 449 Mich 531, 534; 536 NW2d 755 (1995). Michigan courts have never addressed whether MCL 600.5813 applies to equitable actions brought under the NREPA.

Defendant argues on appeal that the six-year limitations period contained in MCL 600.5813 bars plaintiff's claim. Judicial interpretation of a statute requires that effect be given to the plain meaning of the words used by the Legislature in the statute under review. *Federated Publications, Inc v City of Lansing,* 467 Mich 98, 107; 649 NW2d 383 (2002). If the language of the statute is clear, then the statute will be enforced as written. *Id.* "Unless otherwise defined in the statute, or understood to have a technical or peculiar meaning in the law, every word or phrase of a statute will be given its plain and ordinary meaning." *Id.*

MCL 600.5813 provides, "[a]ll other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes."[3] Black's Law Dictionary (6th ed) defines "personal action" as follows: "In civil law, an action *in personam* seeks to enforce an obligation imposed on the defendant by his contract or delict; that is, it is the contention that he is bound to transfer some dominion or to perform some service or to repair some loss." *See also* 1 Am Jur 2d, Actions, § 38, p 572 ("Personal actions are those brought for the specific recovery of goods and chattels, or for damages or other redress for breach of contract or other injuries, of whatever description, the specific recovery of lands, tenements, and hereditaments only excepted").

Here, plaintiff brought a civil action against defendant, an individual who allegedly failed to comply with the prohibitions or conditions of Part 303 of the NREPA. Plaintiff's injunctive action to require defendant to restore the wetland comes within the meaning of a "personal action" as defined in MCL 600.5813, because it seeks to "repair some loss." Actions brought by government departments on behalf of the Attorney General are deemed personal actions. See

[3] MCL 600.5813 applies "equally to all actions whether equitable or legal relief is sought." MCL 600.5815.

Great Lakes Gas Transmission Co v State Treasurer, 140 Mich App 635, 650; 364 NW2d 773 (1985).

Further, as both parties acknowledge, there is no statute of limitations specified in the NREPA. While MCL 324.30316 provides for the commencement of a civil action by the Attorney General to seek "appropriate relief, including injunctive relief" for permit violations, it does not state a period of limitation for bringing such actions. The Revised Judicature Act specifies that MCL 600.5813 is the general statute of limitations applying to "[a]ll other personal actions . . . unless a different period is stated in the statutes." This Court has held that "a civil cause of action arising from a statutory violation is subject to the six-year limitations period found in § 5813, if the statute itself does not provide a limitation period." *DiPonio Constr Co v Rosati Masonry Co,* 246 Mich App 43, 56; 631 NW2d 59 (2001). There being no period of limitation expressly applicable to actions brought under the NREPA, the general limitation provisions of MCL 600.5813 apply.[4]

Plaintiff, citing *Taylor v S.S. Kresge*, 332 Mich 65, 75; 50 NW2d 851 (1952), argues that statutes of limitations are not applicable to equitable actions such as the claim asserted by plaintiff in this case. *Taylor* does indeed hold that statutes of limitation do not apply to equitable actions. However, subsequent to the Supreme Court's decision in *Taylor*, the Michigan Legislature enacted MCL 600.5815, which provides that "[t]he prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought. . . ." Thus, the Michigan Legislature's action of expressly stating that Michigan's statutes of limitations apply to equitable actions essentially rendered moot that portion of the Supreme Court's decision in *Taylor*.

Having determined that the six-year statute of limitations applies to this cause of action, we must next determine when the claim accrued. The accrual provision in MCL 600.5827 provides that "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." In the present case, plaintiff granted defendant the modified permit on March 15, 1988. Defendant completed his work on the property in 1988. Plaintiff filed the instant action on March 28, 1996. Plaintiff alleges that defendant was in violation of the modified permit issued to him on March 15, 1988. Consequently, more than six years passed between the time the purported violation occurred in 1988 and the time the claim was filed on March 28, 1996.

We find unpersuasive plaintiff's claim that the limitation period is tolled by defendant's continuous wrongful acts. "The continuing-wrongful-acts doctrine states that 'where a

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[4] To the extent that *Preserve the Dunes, Inc v Dep't of Environmental Quality,* 253 Mich App 263, 303-304; 655 NW2d 263 (2002), lv gtd 468 Mich 869 (2003), holds that an agency's authority to issue a permit is not limited by any statute of limitations because no time limitation exists either with an MEPA action or within the SDMA, Part 637 of the NREPA, we find this holding factually distinguishable from the case at hand. *Preserve the Dunes, Inc, supra,* contemplates whether a statute of limitations exists regarding an agency's authority to issue a permit. By contrast, the present case deals with the Attorney General's ability to commence a civil action against a "person who willfully or recklessly violates a condition or limitation in a permit issued" by a department. MCL 324.30316(3).

defendant's wrongful acts are of a continuing nature, the period of limitation will not run until the wrong is abated; therefore, a separate cause of action can accrue each day that defendant's tortuous conduct continues.' " *Jackson Co Hog Producers v Consumers Power Co,* 234 Mich App 72, 81; 592 NW2d 112 (1999) quoting *Horvath v Delida,* 213 Mich App 620, 626; 540 NW2d 760 (1995). However, "a continuing wrong is established by continual tortuous *acts*, not by continual harmful effects from an original completed act." *Horvath, supra* at 627 (emphasis in original). Defendant is alleged to have committed a wrongful act in 1988, when he developed his property in a way that plaintiff now claims was in violation of the modified permit. Once defendant developed the property in question, his alleged wrongful conduct ceased. The effects of the work defendant performed on the property in 1988 are the basis of this 1996 suit. These effects resulted from a non-continuous act, the property development, which occurred in 1988. Consequently, we conclude that defendant's actions simply do not fall within the ambit of the continuing-wrongful-acts doctrine and plaintiff's reliance on this doctrine is misplaced.

Plaintiff further contends that defendant was involved with additional dredging in 1991 while attempting to comply with the cease and desist order issued by plaintiff on August 8, 1991. Plaintiff alleges that this act in 1991 was a "continuing wrongful act" that tolled the statute of limitations until 1997. We disagree.

Defendant was granted a permit to construct a ten-foot wide pathway. Defendant stated in his affidavit that in 1989 or 1990, the pathway that he constructed pursuant to the modified permit eroded and may have "spread as much as two feet on either side." In August 1991, defendant received a cease and desist order to remove the access path in "excess of 10' wide" by September 8, 1991, or corrective action would be ordered. Defendant then admittedly dredged a four-foot strip and removed the excess sand from the pathway and allowed the wetland reeds to grow back in the eroded area. Additionally, per directive of the modified permit, defendant installed sod over the sand on the pathway in order to prevent further erosion.

Defendant's actions in 1991 conformed to the cease and desist order. Should we adopt plaintiff's argument, we would place defendant in the very peculiar position of having an otherwise time-barred claim revived solely because of defendant's efforts to comply with a cease and desist order issued by plaintiff. The action in 1991 taken by defendant can hardly be termed a "wrongful tortuous act," but rather an attempt to comply with an order issued by plaintiff. Defendant was merely attempting to remedy an effect that occurred as a result of the installation of the pathway in 1988. Defendant's actions in this regard may result in two possible outcomes. If defendant's actions satisfied the cease and desist order, there would be no reason to pursue further proceedings of any type. Alternatively, if defendant did not comply with the order, plaintiff could have timely brought an action under the NREPA or plaintiff could have pursued contempt proceedings for failing to comply with the order. Plaintiff may not, however, do nothing for five years and then pursue otherwise time-barred claims dating back to 1988. Therefore, we conclude that defendant's attempt to comply with the cease and desist order does not equate to a wrongful tortuous act within the meaning of the continuing violation doctrine.

Plaintiff also contends that the statute of limitations should not bar its action because plaintiff has not sat by idly between 1988, when it issued the modified permit, and March 1996 when it filed the complaint in this action to restore the wetlands. Specifically, plaintiff claims that throughout the period of time that defendant litigated plaintiff's denial of the original permit, plaintiff attempted to enforce its modified permit and obtain restoration of the wetlands in a

criminal action brought in the district court. However, plaintiff did not have to wait until the Supreme Court denied defendant's application for leave to appeal the denial of the original permit before instituting a civil suit against defendant for violations of the modified permit. The fact that plaintiff filed a criminal action in the district court against defendant to enforce its permit underscores the fact that plaintiff could have timely filed a civil action against defendant for violating the modified permit. Plaintiff simply chose not to do so. There simply is no link between defendant's attempts to reverse on appeal plaintiff's denial of the original permit and plaintiff's failure to prosecute the instant action in a timely fashion. Cf. *Gebhardt v O'Rourke*, 444 Mich 535, 554; 510 NW2d 900 (1994) (holding that "successful postconviction relief is not a prerequisite to the maintenance of a claim for legal malpractice arising out of negligent representation in a criminal matter").

B. Docket No. 232934: Attorney Fees and Costs

Defendant appeals the denial of costs and attorney fees as a sanction for the pursuit of frivolous claims by plaintiff. We find no clear error in the trial court's determination that defendant was not entitled to attorney fees and costs under either MCR 2.114 or MCR 2.625. A trial court's finding that a claim or defense was frivolous will not be reversed on appeal unless clearly erroneous. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002); *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Kitchen, supra* at 661-662.

Every document of a party represented by an attorney must be signed by at least one attorney of record, which constitutes a certification that: (1) the signor has read the document; (2) to the best of the signor's knowledge, information and belief after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. MCR 2.114(D). If a pleading is signed in violation of MCR 2.114, the party or attorney or both must be sanctioned. MCR 2.114(E). In addition, a party pleading a frivolous claim is subject to costs under MCR 2.625(A)(2). MCR 2.114(F). The frivolous claims provisions impose an affirmative duty on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. *LaRose Mkt, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). The reasonableness of the inquiry is determined by an objective standard. *Id.* The focus is upon the efforts taken to investigate a claim before filing suit, and a determination of reasonable inquiry depends on the facts and circumstances of the case. *Id.* The attorney's subjective good faith is irrelevant. *Lloyd v Avadenka*, 158 Mich App 623, 630; 405 NW2d 141 (1987). That the alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry. *Lockhart v Lockhart*, 149 Mich App 10, 14-15; 385 NW2d 709 (1986).

We cannot conclude that the trial court clearly erred when it determined that plaintiff's legal position regarding the statute of limitations issue had arguable legal merit. This is apparently the first time that the catch-all six-year statute of limitations for "all personal actions" found in MCL 600.5813 has been applied to a case arising under the NREPA. In addition, plaintiff's tolling arguments, although rejected by both this Court and the trial court, were not so lacking in legal merit as to conclude that plaintiff's action was frivolous. Sanctions are not

required and should not be imposed merely because the legal argument advanced by a litigant is rejected by the court. Where, as here, there is no developed case law mandating a particular result, sanctions under MCR 2.114 and MCR 2.625 are not warranted.

III. Conclusion

In sum, the trial court properly granted summary disposition on the ground that the six-year period of limitations in MCL 600.5813 barred plaintiff's action. Further, we find no clear error in the trial court's decision that defendant was not entitled to attorney fees and costs. We affirm the trial court's order granting defendant summary disposition and affirm the trial court's order denying defendant costs and attorney fees.

Affirmed.

/s/ Brian K. Zahra
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Owens, P. J., Markey and Murray, J.J.

PRESERVE THE DUNES, INC.,

Plaintiff-Appellee

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

TECHNISAND, INC.

Defendant-Appellant

/

Supreme Court No. 122611

Court of Appeals No. 231728

Berrien CC No. 98-003789-CE

PRESERVE THE DUNES, INC.,

Plaintiff-Appellee

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant-Appellant

TECHNISAND, INC.

Defendant.

/

Supreme Court No. 122612

Court of Appeals No. 231728

Berrien CC No. 98-003789-CE

PROOF OF SERVICE

Susan Bertram, being first duly sworn, deposes and says that on August 1, 2003, she served two copies of DEFENDANT-APPELLANT MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY'S REPLY BRIEF upon the individuals named below by

enclosing same in an envelope with postage fully prepaid thereon and depositing same in the United States Post Office by first-class mail, plainly addressed as follows:

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Susan Bertram

Subscribed and sworn to before me
this 1st day of August, 2003.

Nancy E. Hart, Notary Public
Ingham County Michigan
My commission expires: July 10, 2006